**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|---|---|---|
| **JOSE ESPARZA** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,056,594 |
| **DRYWALL SYSTEMS, INC.** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **ACE AMERICAN INSURANCE COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant requested review of the June 11, 2013, Award by Administrative Law Judge (ALJ) Rebecca Sanders. At the request of the parties, the Appeals Board (Board) placed this matter on its summary docket as of August 26, 2013.

### APPEARANCES

Scott M. Price, of Salina, Kansas, appeared for the claimant. Michael D. Streit, of Wichita, Kansas, appeared for respondent and its insurance carrier. Due to a conflict, Board Member Gary R. Terrill has recused himself from this appeal. Accordingly, Jeffrey E. King, of Salina, Kansas has been appointed as a Board Member Pro Tem in this case.

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

## ISSUES

The ALJ denied claimant's claim for compensation after finding no evidence to establish that claimant had an injury by repetitive trauma due to his work activities. The ALJ noted that claimant had received treatment for prior back pain in the same area where he is currently claiming an injury. The ALJ determined claimant's injuries are an exacerbation or aggravation of preexisting back problems. Ultimately, the ALJ found claimant's accidental injury did not arise out of and in the course of his employment. It was also determined that, if claimant's date of accident is June 10, 2011, claimant failed to provide timely notice of a work-related accident.

Claimant appeals, arguing the ALJ erred in finding that he did not suffer personal injury through repetitive trauma while working for respondent in a series of accidents from November 2010 through June 10, 2011; in finding that claimant's repetitive injuries did not arise out of and in the course of his employment; that he did not give timely notice; and that his repetitive trauma at work was not the prevailing factor for his injury and subsequent impairment. Claimant contends he was injured out of and in the course of his employment and gave timely notice of the accident. Therefore, he is entitled to an award for a permanent whole person functional impairment.

Respondent argues that the Award of the ALJ should be affirmed and claimant denied compensation, as claimant's alleged back injury occurred at home. In the alternative, should the Board find claimant was injury at work, at best, he suffered an aggravation of a preexisting condition that is not compensable. If claimant's claim is found compensable, respondent argues claimant would have no more than an 11.5 percent whole person functional impairment.

The issues raised by claimant are as follows:

1. Did claimant meet with personal injury, while working for respondent, in a series of repetitive trauma from November, 2010 through June 10, 2011?

2. Did claimant's repetitive trauma injuries arise out of and in the course of his employment?

3. Did claimant give adequate notice to the respondent?

4. Was claimant's alleged repetitive trauma the prevailing factor for claimant's alleged injury and subsequent impairment?

5. What is the nature and extent of claimant's injury and disability?

6. Is claimant entitled to unauthorized and future medical compensation?

## FINDINGS OF FACT

Claimant began working for respondent in November 2010. Claimant's job title was framer and sheetrocker. His job duties included building outlines or walls of structures, putting up studs and hanging sheetrock. He completed this work by hand and with an air gun. Claimant alleges he stopped working for respondent because he was having problems with his back. He testified that he spoke with Brian, one of the foremen, about his back problems and was told to man up and get back to work. Claimant testified that when his pain got so bad he couldn't walk, he contacted another foreman, Zach Batson, and told him that he was going to seek chiropractic treatment for his back. Claimant testified that he told Zach he thought his back pain was from too much bending.

When the chiropractic treatment failed to improve claimant's condition, claimant was sent to his family physician, Dr. Gary Williams. Dr. Williams gave claimant two epidural injections and sent him to physical therapy for eight weeks, around May 2011. After tests were performed, claimant was told he had degenerative discs and was given a lifting restriction of no more than 20 pounds. Claimant was told that respondent had no light duty available at that weight. His last day of work was June 10, 2011.

In August 2011, claimant was working for Advance Auto as a material handler. This job required that claimant drive a forklift moving pallets to a shipping area. Claimant was laid off from this job after two weeks when they switched him to a position that required heavy lifting and he was unable to do the job. Claimant begin working for Metal Cast in October 2011 as a machine operator making casting molds for agricultural parts. This job does not require claimant to do any lifting. It does require that he stand and push buttons

Claimant's pain complaints are in his mid and lower back. He did not have a specific accident, but simply developed pain from heavy lifting. The last time claimant met with a medical provider was in July 2012, when he met with Dr. Fluter. Claimant was told by Dr. Kahn that surgery would not do him any good and that he should consider a spinal stimulator. Claimant testified that he continues to have pain. He admits to having previous problems with his back in 2007, for which he received several chiropractic treatments. The 2007 pain was located in claimant's mid and upper back.

Claimant alleges that he informed Erica, in the main office, on June 21, 2011, that he was injured at work. Claimant testified a week after he first reported his injury to Erica, she told him he was not entitled to workers compensation benefits because she heard from Zach that claimant was injured at home. Claimant denies being injured at home.

Claimant continues to have back pain. He testified that since he has moved back to Salina he was going to try to return to his job with Metal Cast as it was not physically taxing on his back.

Brian Randol, field manager for respondent, testified that while he worked with claimant, there was never any report of claimant suffering an injury on the job. He also never received any report of claimant injuring his back at home. Mr. Randol indicated he learned later that claimant had reported to someone else that his back was bothering him. Mr. Randol testified that he and claimant are not friends, but did get along fine when it came to work.

Zach Batson, operations manager for respondent in Salina, testified that he recalls claimant being an employee of respondent. Mr. Batson testified that he does not work in the field, but he was involved with the last project claimant worked on. Mr. Batson remembers claimant reporting an on-the-job injury. He testified that claimant reported on June 13, 2011, of hurting his back at home, possibly while moving or lifting. Claimant stated he had contacted Erica in HR on June 10, 2011. Claimant also said he was going to seek medical attention.

Exhibit No. 1 to Mr. Batson's deposition is a typed description of the communication Mr. Batson had with claimant regarding the June 13, 2011, telephone conversation and later conversations and text messages from claimant regarding claimant's back problems. The exhibit was typed from Mr. Batson's memory and from text messages left on Mr. Batson's cell phone. Claimant's conversation with Erica indicated a possible work injury on June 10, 2011, but gave no particulars on how the injury may have occurred. He acknowledged claimant would regularly handle sheet rock weighing from 50-100 pounds. Claimant advised Mr. Batson that he had no pain on June 10, 2011. However, on Saturday, June 11, 2011, claimant awoke with back pain. Claimant asked Mr. Batson whether he had disability insurance. He was told to contact Erica with his questions. The first indication of a work related connection with claimant's back pain occurred on June 21, 2011, when claimant advised Erica that he may have hurt himself at work on June 10, 2011, but wasn't sure.

Doug Fleming, a carpenter and sheetrock worker for respondent, testified he did work on some of the same jobs as the claimant. Mr. Fleming acknowledged he would be classified as a foreman, but had no authority to hire or fire workers. He just made sure the job got done. He testified that it is not unusual for workers on the crew to carry a sheet of sheetrock by themselves as it is easier to handle sometimes. Mr. Fleming does not remember claimant ever telling him that his back was sore. He also does not remember hearing claimant tell Brian Randol that he had back pain.

Anthony Fleming, a member of one of the crews for respondent, testified that he worked with claimant on a few jobs. Mr. Fleming testified that he was aware that claimant was hurt, but that claimant told him he was hurt at home while digging holes and planting flowers. Mr. Fleming also testified that claimant never complained of his back being sore, although claimant could have said something to someone else and he just didn't hear it.

Mr. Fleming testified that two months before his April 25, 2013, deposition he saw claimant playing basketball at a family gathering. He testified that since the accident in 2011, he has seen claimant playing basketball on at least 15 to 20 different occasions. He clarified that what he witnessed was more like shooting baskets than an actual game.

Matthew Lashley, safety director for respondent, testified that he never received notice from claimant regarding an injury to his low back. He is aware of a conversation claimant had with Erica Ledesma, the HR Manager, on June 21, 2011, about an alleged injury. Mr. Lashley testified that he was in Ms. Ledesma's office when claimant called to say that he hurt his back at home and wondered if he could sign up for unemployment. Mr. Lashley heard the entire conversation over a speaker phone. Claimant was told by Erica that unemployment required he be ready and able to work. After he was told that he would need to see his own doctor because he was hurt at home, claimant changed his story to state that he hurt himself at work. This was the first Mr. Lashley heard of any alleged work injury for claimant. He went to testify that when claimant found out he was not going to get workers compensation he got angry and hung up.

Claimant's employment was terminated shortly after his deposition was taken on September 20, 2012, after respondent found out claimant was working elsewhere, despite submitting a doctor's note stating that he was unable to work.

Claimant met with James M. Vander Yacht, D.C., a chiropractor, for the first time on March 21, 2007, with low back pain, neck pain and mid/upper back pain. He was diagnosed with low back pain and lumbar disc degeneration. Claimant reported having the pain for three weeks with no apparent cause. Claimant was seen again on March 23, March 28, and March 30, 2007, with no change in the diagnosis. Claimant was seen again on April 4, 2007, and responded well to treatment, again with no change in the diagnosis.

Claimant did not show for his next two visits, and was not seen again until May 20, 2011, three years after his last visit, with complaints of neck pain, mid back pain and low back pain. Claimant reported that his back feels good during the day at work. The pain hurts him mainly at night and affects his sleep. Dr. Vander Yacht felt claimant had lumbar disc degeneration with low back pain and lumbar somatic dysfunction; cervicalgia with cervical somatic dysfunction; and thoracic spine pain with thoracic somatic dysfunction. Dr. Vander Yacht identified claimant's complaints as "pretty much the same complaints he presented with here back in 2007."[1] Claimant never reported any accident or injury associated with his complaints.

Dr. Vander Yacht opined claimant's problems could be corrected and that the overall prognosis was good, as long as claimant cooperated with the treatment plan. Claimant was again examined on May 27, 2011, with no change in the diagnosis or treatment

[1] Vander Yacht Depo., Ex. 2 at 3.

recommendations. Claimant was allowed to continue to work without restrictions. Claimant was released PRN on June 10, 2011.

Claimant first met with Gary Williams, M.D., his family physician, who is board certified in family medicine, on November 12, 2010, for reasons unrelated to this claim. The first time claimant met with Dr. Williams in regard to his back was on June 14, 2011. Claimant had been seeing a chiropractor for his back pain for one to two months before the examination, with no history of injury. Claimant's pain was localized to the mid and low back. Dr. Williams recommended claimant continue with his chiropractic treatment, engage in home physical therapy and suggested a Medrol Dosepak, Flexeril and Lortab.

Claimant returned on June 21, 2011, indicating that he thought he was ready to return to work. However, while working in his yard, his symptoms flared up. Dr. Williams indicated claimant never related his pain to his work for respondent. Claimant had an MRI of the lumbar spine on June 23, 2011, which revealed a right paracentral disk protrusion at L4-5, with moderate right recess stenosis and mild central canal stenosis, associated impingement of the transiting L5 nerve root, and a small central disk protrusion at L3-4 with mild central canal stenosis resulting.

Claimant had an MRI of the thoracic spine on June 29, 2011, which revealed a focal disk protrusion in the right paracentral areas of T5-6 and T6-7 more extensive at the T6-7 level, and schmorl nodes at T7-8 and T8-9. At no time did claimant advise Dr. Williams that his pain was the result of his work duties. If claimant had advised Dr. Williams of a work connection to his pain, it would be reflected in his records.

Claimant met with Casey Vidrickson, D.C., a chiropractor on June 13, 2011, with a complaint of back pain. Dr. Vidrickson noted no accident or injury in relation to claimant's pain. Dr. Fluter indicated that it is possible that a patient could injure his back at work doing heavy lifting, twisting, and bending and not realize the source of discomfort. Also, claimant reported that he felt his work for respondent was aggravating his pain. Claimant was again seen on June 14, 2011. Claimant reported feeling better after the first session until that night, when he woke up in pain. Claimant was referred to his primary care physician.

At the request of his attorney, claimant met with board certified physical medicine and rehabilitation physician George G. Fluter, M.D., on July 5, 2012, for an examination related to upper back and lower back injuries, beginning on May 15, 2011, and continuing. Claimant denied any prior problems with his back. He reported that the pain in his low back was sharp and severe and that lying down and sitting made the pain worse. He described the pain as constant and worse in the morning. He reported that walking helped to alleviate his pain. Claimant was working for Metal Cast at the time of this visit, as respondent had not been able to accommodate his restrictions.

Dr. Fluter examined claimant and diagnosed upper/middle/lower back pain; cervical/thoracic/lumbar strain/sprain; myofascial pain affecting the upper, middle and lower back; thoracic and lumbar discopathy; and probable right L5 nerve root impingement. He opined that there is a causal/contributory relationship between claimant's current condition and work-related activities associated with drywall work. He went on to opine that the prevailing factor is the repetitive activities, which are over and above those associated with routine activities of daily living. Dr. Fluter opined that if claimant's condition was present before, it might have been aggravated by claimant's work for respondent. However, Dr. Fluter had no medical records available on claimant prior to 2011.

Dr. Fluter rated claimant with a 15 percent permanent partial impairment to the body as a whole (5 percent for the myofascial pain in the cervical spine; 8 percent for the lumbar spine; and 10 percent for the lumbosacral spine). He assigned restrictions of no lifting, carrying, pushing or pulling over 50 pounds occasionally and 20 pounds frequently; avoid holding the head and neck in awkward and/or extreme positions; restrict overhead activities to an occasional basis; and restricts bending, stooping, crouching and twisting to an occasional basis. Finally, Dr. Fluter recommended claimant continue with his medication and may want to consider pain management and possibly a spinal cord stimulator on a trial basis.

## PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(b)(c) states:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(e) states:

> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no

case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
In no case shall the date of accident be later than the last date worked.

K.S.A. 2011 Supp. 44-508(f)(1)(2)(3)(A) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.
(B) An injury by accident shall be deemed to arise out of employment only if:
(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
(iii) accident or injury which arose out of a risk personal to the worker; or
(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2011 Supp. 44-508(g) states:

> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Claimant alleges a series of trauma injuries through his last day of work with respondent on June 10, 2011. However, when claimant first contacted respondent, his inquiry involved unemployment and disability insurance. It was not until claimant was told he did not qualify for unemployment and respondent had no disability insurance that he claimed a work related accident and injury. Additionally, when claimant sought medical treatment in June, 2011, he failed to advise the treating health care providers that there was a work-related connection to his complaints. Finally, claimant was diagnosed with the same conditions and symptoms in 2007, while being treated by Dr. Vander Yacht.

It is claimant's burden to prove his entitlement to the benefits claimed under the Act. Claimant has failed in that burden. The denial of benefits by the ALJ is affirmed.

## CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has failed to prove he suffered personal injury by repetitive trauma while working for respondent. The evidence supports a finding that claimant was injured while working at home and only claimed a work connection after both unemployment and disability insurance became unavailable to him. The denial of benefits in this matter by the ALJ is affirmed.

This finding renders the remaining issues raised in this matter moot.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated June 11, 2013, is affirmed.

**IT IS SO ORDERED.**

Dated this _____ day of September, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Scott Price, Attorney for Claimant
mkpattorneys@sbcglobal.net
scottlaw@ sbcglobal.net

Michael Streit, Attorney for Respondent
amcfeeters@wallacesaunders.com
mds@wsabe.com
esalgado@wallacesaunders.com

Rebecca Sanders, Administrative Law Judge